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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/648,047	08/26/2003	Bill H. McAnalley	23100.61	3228

27683 7590 06/28/2007
HAYNES AND BOONE, LLP
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EXAMINER	
MOSS, KERI A	
ART UNIT	PAPER NUMBER
1743	

MAIL DATE	DELIVERY MODE
06/28/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/648,047	MCANALLEY ET AL.	
	Examiner	Art Unit	
	Keri A. Moss	1743	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-35 is/are pending in the application.

4a) Of the above claim(s) 23-35 is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-22 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date 1/12/04;9/26/05.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:

   I. Claims 1-22, drawn to an antioxidant composition, classified in class 424, subclass 725.

   II. Claims 23-35, drawn to a method of measuring activity of an antioxidant, classified in class 422, subclass 68.1.

The inventions are distinct, each from the other because of the following reasons:

2. Inventions I and II are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different designs, modes of operation, and effects (MPEP § 802.01 and § 806.06). In the instant case, the different inventions are not disclosed as capable of use together as the method for measuring antioxidant activity in Group II does not require the particulars of the antioxidant composition of Group I.

3. Because these inventions are independent or distinct for the reasons given above and there would be a serious burden on the examiner if restriction is not required because the inventions have acquired a separate status in the art in view of their different classification, restriction for examination purposes as indicated is proper.

4. Because these inventions are independent or distinct for the reasons given above and there would be a serious burden on the examiner if restriction is not required

because the inventions require a different field of search (see MPEP § 808.02), restriction for examination purposes as indicated is proper.

5. During a telephone conversation with Mr. Randall Brown, attorney for applicant, on June 22, 2007 a provisional election was made without traverse to prosecute the invention of Group I, claims 1-22. Affirmation of this election must be made by applicant in replying to this Office action. Claims 23-35 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

6. Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

Claim Rejections - 35 USC § 103

7. Claims **1-14, 18 and 20** are rejected under 35 U.S.C. 103(a) as being unpatentable over Fleischner (USP 6,291,533). Fleischner teaches an antioxidant composition comprising a flavanoid such as isoflavone or a flavanol such as quercetin, a mixture of two forms of Vitamin E, green tea extract and a carrier such as aloe vera gel extract. Fleischner does not teach a ratio of flavonoid to mixture of vitamin E forms as 40/60 to 90/10 percent by weight. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980) teaches that optimization of a result-effective variable is ordinarily within

the skill of one in the art. A result-effective variable is one that has well-known and expected results.

The selection of percentage by weight of any ingredient in the antioxidant composition are result effective variables. Varying the percentage by weight of any ingredient has the well-known and expected result of producing the desired result of the ingredient (i.e. improved cardiovascular health) in a composition of a varied size. Therefore, it would have been obvious to one of ordinary skill in the art to meet the percentage by weight requirements of claimed ingredients such as flavanoid such as isoflavone or a flavanol such as quercetin, a mixture of two forms of Vitamin E, green tea extract and a carrier such as aloe vera gel extract by modifying Fleischner and selecting the flavonoid/vitamin E mixture percentage by weight of 40/60 to 90/10 in order to control for the desired result and control the size of the composition.

8. Claims **15-17, 19, 21-22** are rejected under 35 U.S.C. 103(a) as being unpatentable over Fleischner (USP 6,291,533) in view of Packer et al. (Direct observation of a free radical interaction between vitamin E and vitamin C, Nature (1979), Vol. 278, pp.737-738). See Fleischner, supra. Fleischner does not teach an antioxidant composition comprising bush plum in addition to a flavanoid such as isoflavone or a flavanol such as quercetin, a mixture of two forms of Vitamin E, green tea extract and a carrier such as aloe vera gel extract. It is well known among those with ordinary skill in the art that vitamin C regenerates vitamin E, as demonstrated by Packer et al. Providing a composition with ingredients that supply both vitamin E and

vitamin C would ensure an effective delivery of vitamin E to the individual. It would have been obvious to modify Fleischner by adding a vitamin C-containing ingredient to the vitamin E-containing composition in order to gain the advantages of regeneration of vitamin E, such as ensuring effective vitamin E to the individual.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keri A. Moss whose telephone number is 571-272-8267. The examiner can normally be reached on 9-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jill Warden can be reached on (571)272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Keri A. Moss

Jill Warden
Supervisory Patent Examiner
Technology Center 1700

Examiner
Art Unit 1743

6/22/07